Nos. 94-1614, 94-1631 and 94-1985

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF WISCONSIN,
Petitioner,
v.
CITY OF NEW YORK, *et al.*,
Respondents.

STATE OF OKLAHOMA,
Petitioner,
v.
CITY OF NEW YORK, *et al.*,
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UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,
Petitioners,
v.
CITY OF NEW YORK, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE STATES OF INDIANA AND OHIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE STATES OF INDIANA AND OHIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI*

Amici—all States—have strong interests in this case. The decision of the Second Circuit, in conflict with the decisions of two other circuits, subjects the federal government to stringent new constitutional constraints on the methods by which it arrives at its census count every ten years. The ruling casts a cloud over the 1990 census count and hence the current allocation of congressional seats among the States, as well as state legislative apportionments that are based on census figures. The legal standards declared by the Second Circuit, if allowed to stand, also will significantly influence the census counts required to be conducted in 2000 and each decade after (and, possibly, the judicial analysis of government action outside the census context). In addition, the ruling has concrete effects on the allocation of large sums of federal money under dozens of federal programs that use the census count to determine the amounts distributed. *Amici* accordingly have a direct interest in having this Court resolve the uncertainty over the census issue presented in this case.

STATEMENT

Every ten years since 1790, the federal government has been conducting an actual count of people for the census required by Article I, Section 2, clause 3 of the United States Constitution, which provides that "[t]he actual Enumeration shall be made . . . [every] ten Years, in such Manner as [Congress] shall by Law direct." It is undisputed in this case that census results miss some people and that more racial minorities are missed than others. *See also* U.S. Pet. 4 (differential undercount also exists for other groups, including men, the young, and renters). In 1987, after considering demands for the use of statistical adjustments of the actual count to correct for this undercount, the United States Secretary of Commerce announced that he would not use statistical sampling methods to adjust the results of the upcoming 1990 federal census.

The following year, plaintiffs—including several States, municipalities, and individuals—brought this action to challenge the Secretary's decision, seeking to compel the adoption of statistical adjustments to the census count. The federal government moved to dismiss the complaint on the ground that the census-count methodology was not subject to judicial review. The district court denied the motion, holding that plaintiffs had standing to challenge the census count on constitutional grounds and that the Secretary's decision should be reviewed under the "arbitrary and capricious" standard of the Administrative Procedure Act. *City of New York v. U.S. Dep't of Commerce*, 713 F. Supp. 48, 52, 54 (E.D.N.Y. 1989) [*City of New York I*], reprinted at Pet. App. 121.[1]

In 1989, the district court approved a stipulation among the parties requiring the plaintiffs to withdraw their motion to enjoin the conduct of the census and the Secretary to reconsider *de novo* his 1987 decision against statistical adjustment. Pursuant to the stipulation, the Secretary in 1990 published a set of Guidelines for re-evaluating the adjustment question, under which, among other things, the burden of proving greater accuracy would be on those seeking an adjustment. *See* 55 Fed. Reg. 9,838 (1990). The district court subsequently held that a statistical adjustment would not in itself violate federal law and that the Guidelines were consistent with the stipulation and not unduly biased against adjustment. *City of New York v. U.S. Dep't of Commerce*, 739 F. Supp. 761, 767, 770 (E.D.N.Y. 1990) [*City of New York II*], reprinted at Pet. App. 96.

After elaborately planning, conducting, and compiling the results of the actual census count in 1990, the Secretary undertook the agreed-upon process for determining whether to adjust the count by statistical methods. Based on a second survey of some 5,000 of the 5,000,000 census

[1] We refer to the appendix to the petition in No. 94-1614 as "Pet. App."

blocks in the Nation, complex statistical methods were applied to produce estimates of the population that differed slightly from the count produced by the 1990 census—by 2.1% originally, by 1.6% after a subsequent correction (in 1993), though still with various biases and unproved but important assumptions inherent in the estimates. Then, after detailed consideration based on the differing views of numerous experts, the Secretary decided on July 15, 1991, that he would not replace the census-count results with the figures produced by the statistical sampling, noting in particular that the proposed statistical adjustment did *not* improve "distributive accuracy," *i.e.*, "getting most nearly correct the proportions of people in different areas." Pet. App. 146-47; *see City of New York II*, 739 F. Supp. at 769 [Pet. App. 114] (Guideline requiring that any adjustment be usable "at all levels"). While acknowledging an overall national undercount among certain populations, including minority groups, the Secretary decided that he would not "abandon a two hundred year tradition of how we actually count people" in favor of the proposed sample-based statistical adjustment. Pet. App. 138; *id.* at 135-415; 56 Fed. Reg. 33,582 (1991); *see City of New York v. U.S. Dep't of Commerce*, 822 F. Supp. 906, 911, 916 n.12 (E.D.N.Y. 1993) [*City of New York III*], reprinted at Pet. App. 41; *see also* 58 Fed. Reg. 69, 73 (1993).

Plaintiffs again attacked the decision not to adjust the census. After consolidating the case with other cases from Florida and Georgia, the district court held a 13-day bench trial, hearing testimony from various experts. The court rejected plaintiffs' claims and upheld the Secretary's decision not to replace the actual count with a statistically based adjustment. *See City of New York III, supra.* The court found the Secretary's rationale for rejecting the adjustment reasonable on a host of grounds, summing up by quoting an expert who had supported adjustment: " 'reasonable statisticians could differ on this conclusion.' "

822 F. Supp. at 929 [Pet. App. 91]; *id.* at 917-31 [Pet. App. 61-95].

On appeal, a divided panel of the Second Circuit reversed. *City of New York v. U.S. Dep't of Commerce*, 34 F.3d 1114 (2d Cir. 1994) [*City of New York IV*], reprinted at Pet. App. 1. The court held that "heightened scrutiny" of the Secretary's census methodology was constitutionally required (a) under the one-person-one-vote apportionment decisions (*e.g., Wesberry v. Sanders*, 376 U.S. 1 (1964); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Karcher v. Daggett*, 462 U.S. 725 (1983)) and (b) because "the unadjusted census undercount disproportionately disadvantages certain identifiable minority groups." 34 F.3d at 1128 [Pet. App. 33]; *see id.* at 1129, 1131 [Pet. App. 34, 39]. Applying what it described as "the more traditional standard applicable to an equal protection claim that a fundamental right has been denied on the basis of race or ethnicity" (*id.* at 1131 [Pet. App. 39-40]), the panel majority ruled that the Secretary's decision not to adjust the census (though a "choice . . . among imperfect alternatives") was unconstitutional, as not a good faith effort to achieve national numerical accuracy as nearly as practicable, unless the Secretary could prove on remand that the decision not to replace the census count with a statistical adjustment "furthers a governmental objective that is legitimate" and "is essential for the achievement of that objective." *Id.* at 1131 [Pet. App. 40].

Judge Timbers dissented, stating that he would follow the district court's decision upholding the Secretary's determination. He also pointed out that the panel majority's decision was in conflict with "[t]he only two other circuits that have ruled on this issue," *Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992), and *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1217 (1994), both of which held that the Constitution

did not provide a basis for judicial invalidation of the Secretary's choice among reasonable alternative census methodologies. *See City of New York IV*, 34 F.3d at 1131-32 (Timbers, J., dissenting) [Pet. App. 40].

REASONS FOR GRANTING THE PETITIONS

The decision of the court of appeals should be reviewed for two reasons. First, it creates a conflict among the circuits on an issue of great and recurring national importance. Second, the decision is unjustified on the merits.

I. THE SECOND CIRCUIT'S DECISION CREATES A CONFLICT AMONG THE CIRCUITS ON AN ISSUE OF GREAT AND RECURRING IMPORTANCE.

The Second Circuit's application of heightened judicial scrutiny to the Secretary's census methodology squarely conflicts, as Judge Timbers observed, with decisions of the Seventh and Sixth Circuits, the only other courts of appeals that have addressed the issue presented. In *Tucker*, the Seventh Circuit thoroughly considered and rejected a challenge to the Secretary's refusal to undertake "a statistical adjustment to the census headcount." 958 F.2d at 1418. The court explained that (a) the disproportionate undercount of minorities, not being purposeful, afforded no basis for heightened judicial scrutiny (*id.* at 1413-14) and (b) the *Wesberry* apportionment doctrine furnished no such basis, because the question of accuracy in the census count was entirely different from the question of equal allocation of voters to electoral districts—not only conceptually but practically: whereas "[e]quality of voting power is an administrable standard, . . . [t]he plaintiffs' claim to a census adjustment invokes no judicially administrable standards. The plaintiffs are not asking us to decree equality. They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical

adjustment to the census headcount." *Id.* at 1418. *Tucker* was explicitly followed by the Sixth Circuit in its subsequent rejection of a similar request for a judicial order compelling the Secretary to adopt an adjustment of the actual census count based on statistical sampling. *City of Detroit*, 4 F.3d at 1375-78.

The decisions of the Seventh and Sixth Circuits thus reject the very claim that the Second Circuit has held warrants heightened judicial scrutiny.[2] Yet the Second Circuit judgment would seem effectively to control the issue nationwide, as the Secretary makes a single national decision to adjust the census or not. With a clear split among the circuits, the issue presented should be subject to a binding national resolution only if that resolution comes from this Court.

The issue presented in these cases is a recurring one. The stringent constitutional standards announced by the Second Circuit will, if unreviewed, apply to the decisions by Congress and the Executive about how to conduct all future censuses, which under the Constitution must be conducted every ten years. U.S. Const., Art. I, Sec. 2, cl. 3. The Second Circuit's decision undoubtedly will provoke complex litigation no matter what choices the federal government makes about future census methodologies. *See, e.g.*, note 11, *infra*. This Court should not

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[2] The Seventh Circuit in *Tucker* phrased its conclusion in terms of the lack of a judicially enforceable right to invalidate the Secretary's census methodology. 958 F.2d at 1418, 1419. But because the court distinguished challenges "to some categorical judgment of inclusion or exclusion argued to be in violation of history, logic, and common sense" (*id.* at 1418), *Tucker*'s holding appears to be equivalently phrased as a determination that the Constitution is not violated by the Secretary's choice among reasonable alternative methodologies. In any event, the result of the Second Circuit decision in the present case is squarely to allow what both the Seventh and Sixth Circuits forbid: judicial invalidation of the Secretary's decision to stay with the actual count as the census methodology.

allow the government's decisions on the many policy and technical issues that determine census methodology to be made under the cloud of an unreviewed constitutional ruling imposing stringent, and unjustified, constraints on those decisions. Nor should the Court allow numerous governmental decisions outside the census context to be made under the cloud of the Second Circuit's novel invocation of heightened judicial scrutiny based entirely on disproportionate racial impact.

The choice of census methodology—now subject to the Second Circuit's new constitutional constraints, imposed in conflict with two other circuits—has important consequences. One set of consequences is representational. The census count directly affects the apportionment among the States of seats in the House of Representatives. U.S. Const., Art. I, Sec. 3, cl. 2; 2 U.S.C. § 2(a); 13 U.S.C. § 141(b). And the apportionment of state legislative seats also is widely based on the official federal census.[3] Even the current allocations of congressional and state-legislative seats, based on the 1990 census to which the Second Circuit's ruling directly applies, have been thrown into doubt: the adjustment originally calculated by the Secretary after the 1990 census would shift two congressional seats, from Wisconsin and

[3] *See, e.g.*, Ala. Const. art. IX, § 198; Alaska Const. art. VI, § 3; Ariz. Rev. Stat. Ann. § 16-1102 (1994); Colo. Const. art. V, § 48; Conn. Const. art. III, § 6; Del. Code Ann. tit. 29, § 805 (1991); Ga. Const. art. III, § 2, ¶ 2; Haw. Rev. Stat. § 25-2 (1992); Ill. Const. art. IV, § 3; Ind. Const. art. IV, § 5; Iowa Const. art. III, § 34; Kan. Const. art. X, § 1; La. Const. art. III, § 6; Md. Const. art. III, § 5; Mass. Const. art. XIII; Mich. Const. art. 4, § 2; Mo. Const. art. III, § 2; Minn. Const. art. IV, § 3; Mont. Const. art. V, § 14; Neb. Const. art. III, § 5; N.H. Const. pt. 2, art. IX; N.J. Const. art. IV, § 2, ¶ 1; N.Y. Const. art. III, § 4; N.C. Const. art. II, § 3; Ohio Const. art. XI, § 2; Okla. Const. art. V, § 9A; Or. Const. art. IV, § 6; R.I. Const. art. VII, § 1; S.D. Const. art. III, § 5; Tex. Const. art. III, § 28; Utah Code Ann. § 36-1-1 (1953); Wash. Const. art. II, § 43; Wis. Const. art. IV, § 3; Wyo. Const. art. III, § 48.

Pennsylvania to Arizona and California. *City of New York IV*, 34 F.3d at 1122 [Pet. App. 17].

Substantial financial consequences also hinge on the official census, and hence on resolution of the uncertainty created by the Second Circuit's ruling. Dozens of federal programs allocate money to the States or their subdivisions based on the figures derived from the federal census. *See City of New York IV*, 34 F.3d at 1117 [Pet. App. 6]; *City of New York III*, 822 F.2d at 911, 918 n.17 [Pet. App. 45, 64]; GAO, *Formula Programs: Adjusted Census Data Would Redistribute Small Percentage of Funds to States* at 5, 16-19 (Nov. 1991) (one hundred such programs).[4] Although overall distributions of federal funds would not change dramatically in percentage terms under the particular adjustment at issue here (the population adjustments, after all, are small in percentage terms), the amounts of money that would be subtracted from or added to the allocations to various States under various programs are now, and can be expected to continue to be, substantial, especially as they occur year after year.[5] The Second Circuit's decision having these

[4] *See, e.g.*, 24 C.F.R. § 570.307 (Community Development Block Grants); 42 U.S.C. § 5306(b)(1)(A)(i) (Community Development/Entitlement); 42 U.S.C. § 300x-7(a)(5)(B) (Community Mental Health Services); 20 U.S.C. § 2921(b) (Federal, State, and Local Partnerships for Educational Improvement); 24 C.F.R. § 791.402 (Housing Assistance Programs and Public and Indiana Housing Programs); 29 U.S.C. § 1572(a) (Job Training Partnership Act, Title IIA: Training Services for Disadvantaged Adult and Youth); 42 U.S.C. § 8623(a)(4) (Low-Income Home Energy Assistance); 42 U.S.C. §§ 702(c)(1)(B)(i), (ii), (Maternal and Child Health Services); 42 U.S.C. § 300w-1 (Preventive Health and Health Services); 42 U.S.C. § 1397f(a)(2)(C) (Social Services); 20 U.S.C. § 6333 (Strengthening and Improvement of Elementary and Secondary Schools); 23 U.S.C. § 104 (Surface Transportation Program).

[5] The GAO study cited in text estimated the reallocations for fiscal year 1991 of three of the 100 programs it identified as population based. For Federal Medicaid Allocations, 17 States would

effects on the budgets of state and local governments should not go unreviewed.

II. THE SECOND CIRCUIT'S APPLICATION OF HEIGHTENED JUDICIAL SCRUTINY TO THE SECRETARY'S CENSUS-COUNT DECISION RESTS ON NOVEL AND UNJUSTIFIED PRINCIPLES.

The Second Circuit decision warrants review not only because of the importance of the issue and the intercircuit conflict it creates, but because of the merits of the decision. The Second Circuit held that "heightened scrutiny" —which it described at one point as traditional strict scrutiny (*City of New York IV*, 34 F.3d at 1131 [Pet. App. 39-40])—applied to the Secretary's decision not to replace the actual census count with the results produced by a methodology based on statistical sampling. It rested that holding on two bases: the disproportionate effects of the census undercount on racial minorities; and the one-person-one-vote apportionment doctrine of *Wesberry* and its successors. The Second Circuit's decision cannot rest on either of these grounds under established constitutional doctrine.

A. The Second Circuit's reliance on disparate racial impact as a ground for heightened scrutiny (*City of New York IV*, 34 F.3d at 1129, 1131 [Pet. App. 33-34, 39]) appears to be directly contradicted by settled constitutional standards. Under *Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), a constitutional claim of unlawful race discrimination is not made out by a showing of disparate racial impact, but requires proof of facial or purposeful discrimination. And knowledge of a disproportionate impact, while it may furnish evidence of, is simply not the same as discriminatory purpose. *See, e.g., Personnel Adm'r of Massachusetts v.*

have lost well over $100 million in that year alone, while 23 States would have gained more than $40 million. GAO, *Formula Programs*, *supra*, at 24-25.

Feeney, 442 U.S. 256, 279 (1979) (government action must be taken " 'because of,' not merely 'in spite of' " its [racial] impact to raise a constitutional claim); *Arlington Heights*, 426 U.S. at 265-66.

In this case, the Second Circuit nowhere suggested that there was any hint of purposeful discrimination behind the Secretary's decision to follow consistent historical practice based on a host of patently good-faith, reasonable grounds for rejecting the proposed statistical adjustment. *See also Tucker*, 958 F.2d at 1413-14. The issue of race would seem, therefore, to drop out of this case under settled equal-protection doctrine. The Second Circuit pointed to no other doctrinal basis that supports its reliance on disparate impact as a justification for heightened judicial scrutiny.

B. The Second Circuit also relied on the *Wesberry* line of decisions as a justification for heightened judicial scrutiny of the Secretary's census-count decision. *City of New York IV*, 34 F.3d at 1125-29 [Pet. App. 26-35]. The court acknowledged in passing that "[t]here are, of course, differences between the present case and the *Wesberry* . . . line of cases." 34 F.3d at 1129 [Pet. App. 34]. But the court nevertheless announced that heightened scrutiny applied in this case, because the court wholly failed to recognize the nature and extent of those differences, as a conceptual, textual, precedential, and practical matter.

The *Wesberry* doctrine is concerned with equality in apportioning already-determined quantities. This case is concerned with accurate determination of the initial quantities. The conceptual difference is the difference between division, on the one hand, and counting or measurement, on the other. Thus, as the Seventh Circuit observed in *Tucker*, "this is [not] an apportionment case, or governed by those cases." 958 F.2d at 1415.[6]

[6] *See also id.* at 1418 (because undercount disproportionately affects people who cannot or do not vote, "this is not a case about

As a textual matter, moreover, while the equal-apportionment issue is governed only by several (implied) equality commands of the Constitution (U.S. Const. Art. I, Sec. 2, cl. 2; Amends. 5, 14; *see Wesberry*, 376 U.S. at 4), the issue of the census count is addressed by a separate, specific clause of the Constitution, U.S. Const. Art. I, Sec. 2, cl. 3. That clause in terms provides for the census count to be conducted "in such Manner as [Congress] shall by Law direct."[7] Textually, then, the census-count question presented here, unlike the equal-apportionment question, is subject to an explicit vesting of discretion in Congress that at a minimum weighs strongly against the Second Circuit's borrowing of heightened scrutiny from the equal-apportionment doctrine. *Cf. United States Dep't of Commerce v. Montana*, 112 S. Ct. 1415, 1429 (1992) (textual delegation to Congress even under Necessary and Proper Clause is reason for deference).

This Court's decisions have never applied heightened scrutiny to the Secretary's method of counting people for the census. *Wesberry*, *Kirkpatrick*, and *Karcher* all involved the decisions of *States* about the equal or unequal allocation of people into electoral districts. In *United States Dep't of Commerce v. Montana*, *supra*, and *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), this Court applied a principle of equal representation to the federal government. Both cases, however, involved the assignment among States of an already-fixed quantity: *Montana* involved the allocation among States of the 435 seats in the House of Representatives; *Franklin* involved the allocation of overseas federal employees to the States. Neither case involved judicial scrutiny of the accuracy of the federal government's count of people, which, indeed,

depriving anybody of his right to vote or about diluting his voting power").

[7] Congress has in turn delegated substantial discretion to the Secretary of Commerce. *See* 13 U.S.C. §§ 141(a), 195.

Franklin recognized as a quite different question.[8] Moreover, even in an apportionment context, the Court in *Montana*, citing separation-of-powers and pragmatic concerns, specifically refused to transpose to the federal government the strict equality standard applied to the States in *Wesberry* and its successors. 112 S. Ct. at 1426, 1429.

There are also strong practical, institutional reasons for the judiciary in applying constitutional standards to distinguish the Secretary's census-count methodology—one that follows consistent historical practice—from "the much easier task of determining district sizes within State borders." *Montana*, 112 S. Ct. at 1429. An adjustment of the actual count based on statistical sampling raises a host of issues as to which there is no single clear "polestar" to "provide sufficient guidance" to courts (*ibid.*)—not only issues about required degrees of accuracy at national and subnational levels,[9] but also the complex technical judgments required in evaluating the assumptions, biases, and reliability of the range of possible statistical adjustments.[10] A choice of census methodology,

[8] *Franklin*, 112 S. Ct. at 2776 ("even if appellees have standing to challenge the Secretary's decision to allocate, they do not have standing to challenge the accuracy of the data used in making that allocation").

[9] With respect to the basic choice of distributive accuracy in preference to overall national accuracy, see U.S. Pet. 16-17.

[10] The proposed adjustment at issue here, for example, presented serious questions on a number of scores: deficiencies in distributive accuracy (the adjustment may have been less accurate for 21-29 States), *City of New York III*, 822 F. Supp. at 922 [Pet. App. 74]; the uncertain accuracy of the post-enumeration survey (*id.* at 921-22 [Pet. App. 72-74]); the high degree of "imputation" of information required for the "matching" process essential to the adjustment (*id.* at 922-23 [Pet. App. 74-76]); the effect of biases, of the uncertain "homogeneity" assumption, and of the "smoothing" process underlying the adjustment (*id.* at 924, 926 [Pet. App. 79-84]); and the apparent non-robustness of the results, so that

unlike a state districting decision, is not "capable of being reviewed under a relatively rigid mathematical standard." *Ibid.* (footnote omitted). Applying heightened scrutiny to the Secretary's decision among reasonable alternative census methods would generate repeated and lengthy litigation over issues not readily amenable to judicial determination by a standard discernable from the Constitution. *Tucker*, 958 F.2d at 1418 ("The plaintiffs' claim to a census adjustment invokes no judicially administrable standards.").[11]

There are also policy reasons, beyond "technical" concerns, that legitimately weigh against any (judicially mandated) adoption of a statistical adjustment. For example, "any attempt to make a statistical adjustment to the mechanical headcount would, by injecting judgmental factors—and ones of considerable technical complexity to boot—open the census process to charges of political manipulation." *Tucker*, 958 F.2d at 1413. *See City of New York III*, 822 F. Supp. at 925-26 [Pet. App. 83]; Pet. App. 213-28. And displacement of the actual count by a sample-based adjustment could have an adverse

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reasonable changes in assumption would produce large changes in result (*ibid.*). *See also* Pet. App. 169-228; 58 Fed. Reg. at 74-75.

In 1993 the Secretary reiterated some of these points in deciding not to adjust the "intercensal" estimates: "In most statistical applications, we never know the true situation, and no model is perfect. Despite the extensive research, too many concerns remain about the level of bias; the estimate of the true population used as the target in loss function analyses; allocation of correlation bias; and whether the homogeneity assumption holds, given the levels of bias, to make a decision to adjust intercensal population estimates defensible across the board to all 44,055 substate areas." 58 Fed. Reg. 75.

[11] Once the issue of race is put aside, it is not clear why the Second Circuit's demand for equal accuracy in counting people would not condemn the conceded inaccuracies of the adjusted results at the subnational level (*see* page 4 & note 10, *supra*) any differently from the inaccuracies of the actual count at the national level.

effect on the census itself by diminishing the incentive of States and citizens to participate actively in the census, of census-takers to execute their responsibilities energetically, and of Congress to provide funding for the census. 822 F. Supp. at 927 [Pet. App. 85]; Pet. App. 228-38. All of these considerations undermine the Second Circuit's application of the *Wesberry* standard of heightened scrutiny to the quite different question of accuracy in the census count.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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